-448 FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1972

NO. 72-448

BILLY WEST DASHER,

Petitioner,

V.

JOHN A. BLACKMON, COMMISSIONER, STATE DEPARTMENT OF REVENUE, and LOWNDES COUNTY, GEORGIA, and FRANK S. STEELE, FOREMAN OF LOWNDES COUNTY GRAND JURY, SEPTEMBER TERM, 1970,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF GEORGIA

The petitioner, BILLY WEST DASHER, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme

Court of the State of Georgia rendered in these proceedings on June 15, 1972.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia, as yet unreported, appears at Appendix A, infra, pp
The opinion of the Superior Court of Lowndes County, Georgia, is unreported, and appears at Appendix B, infra, pp
The motions for rehearing were denied on June 28, 1972 as evidenced by copy of notice in the form of a post card denying rehearing and thereby exhausting petitioner's source of remedy in the courts of the State of Georgia; thereby giving this honorable court jurisdiction.

JURISDICTION

The opinion of the Supreme Court of Georgia was entered on June 15, 1972. See Appendix A, p. 1, infra. Rehearing by Georgia Supreme Court was denied on June 28, 1972. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

The September, 1970, Grand Jury in and for Lowndes County, Georgia, not in its traditional role of considering evidence to determine whether an indictment should issue, but rather sitting in judgment, imposed a penalty or fine in the amount

of One Thousand, Twenty Eight and 59/100 ($1,028/59) Dollars, plus interest upon petitioner in his capacity as Tax Commissioner for said County of Lowndes, and in so doing, did not serve petitioner with a Grand Jury Presentment, did not conduct a trial, and/or did not allow petitioner an opportunity to present evidence in his behalf and in rebuttal to the case then and there being considered by the Grand Jury. In their attempt to impose said fine pursuant to so much of the Georgia Laws, 1964-65, p. 66, Ga. Code Ann. § 92-7107, the Grand Jury did not allow petitioner an opportunity to employ counsel; whereupon petitioner filed a petition for injunctive and equitable relief alleging the penalty or fine as proposed under the circumstances to be unconstitutional, contrary to the laws of the State of Georgia and the Constitution of the United States of America, void and unenforceable.

The questions thereby arising are:

(a) Can the State Government impose a fine or forfeiture upon one of its citizens without the benefit of notice, process of service, trial by jury, an opportunity to introduce witnesses, or without the benefit of a hearing of any sort for the mere reason that by assuming public office, the public official surrenders part of his rights as an individual to be protected against the infliction of a penalty of either a fine or imprisonment unless he has been afforded a trial?

(b) Whether or not the action of the Georgia Supreme Court was correct in holding that the County of Lowndes, State of Georgia, was not a proper party defendant. This being a case where the petitioner had alleged a violation of his constitutional rights and in which case the Supreme Court of the State of Georgia cited as its authority the case of Millwood v. DeKalb County, 106 Ga. 743, the same sounding in tort and a proper application of sovereign immunity, which doctrine does not and cannot have any effect on suits involving constitutional rights.

(c) Petitioner is informed and believes that the attempt by defendants to impose a penalty or fine upon him as Tax Commissioner is an action which is original in nature and has never before been attempted against petitioner's predecessors in office, even though there have always been delinquent taxes in all previous administrations, and that such action on the part of defendant is a product of ill will and politically inspired, which presents the following question: Does the action on the part of defendants amount to intentional or purposeful discrimination in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

(d) Whether the Acts of the General Assembly (Georgia Laws, 1963, pp. 3064, 3065, approved April 9, 1963) violates the Equal Protection Clause of the

Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV:

> "... nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

Georgia Laws, 1943, pp. 284, 287; Ga. Code Ann. § 40-1617.

> "Procedure on indictments for misfeasance or malfeasance in office - Before an indictment against any State official charging him with misfeasance or malfeasance in office shall be laid before a grand jury, the rights provided in Section 89-9908 relating to county officials shall be afforded the said state official and the Attorney General of Georgia shall be notified of such contemplated action, by the solicitor general of the county wherein the grand jury shall convene. (Acts 1943, pp. 284, 287.)"

Georgia Laws, 1967, pp. 858, 859; Ga. Code Ann. § 89-9908.

> "Indictment, presentment or accusation for malpractice; appearance before grand jury. - A proposed indictment,

presentment, or accusation under the preceding section shall specially set forth the merits of the complaint, and a copy thereof shall be served on the accused before it is laid before the grand jury. The accused shall have the right to appear before the grand jury and make such statement, sworn or unsworn, as he shall desire at the conclusion of the presentation of the State's evidence; the accused shall not be subject to examination either direct or cross, and shall not have the right individually or through his counsel to examine witnesses; the accused and his counsel shall have the right to be present during the presentation of all evidence and statements of the accused, sworn or unsworn, on the proposed indictment, presentment, or accusation, after which he and his counsel shall retire from the grand jury room. If a true bill is returned by the grand jury, the case shall proceed to trial as in other criminal cases. (Acts 1967, pp. 858, 859)"

Georgia Laws, 1884-85, p. 66; Ga. Code Ann. § 92-5106:

"Penalties - For a violation of any of the provisions of the five preceding sections, the tax collector so violating shall forfeit all or such part of his commissions as the grand jury of the county shall recommend; and if he fails to pay over such penalty imposed, it shall be enforced

against such tax collector and his securities by the State Revenue Commissioner, as provided by law against defaulting tax collectors, with 20 per cent penalty of the amount added thereto. (Acts 1884-85, p. 66)."

Georgia Laws 1963, pp. 3064, 3065 (Approved April 9, 1963):

"Section 1. In all counties of this State having a population of not less than 47,500 and not more than 49,500, according to the U. S. Census of 1960 or any such future census, the tax commissioner of said counties shall be possessed with the additional powers, duties and responsibilities as are set forth in this Act.

"Section 2. The tax commissioner shall have full authority to levy and collect all tax fi.fas. issued by the tax commissioner as fully and effectively as if done by the sheriff of said county. The tax commissioner shall have the power to bring all property subject to said fi.fas. to sale and to sell the same in accordance with the procedures relating to sheriffs' sales as is now or may hereafter be provided by law. For the purposes of collecting tax fi. fas., the tax commissioner is hereby vested with such powers and authority as is by law granted to sheriffs only insofar as levies, sales and conveyances of property are concerned. The tax commissioners' powers and

authority shall be limited to tax fi.fas. only which are issued by the tax commissioners.

"Section 3. The tax commissioners, in carrying out the provisions of this Act, shall have the power and authority to appoint one or more deputies which shall have all the powers of said tax commissioners only insofar as the levy and collection of taxes is concerned. The advertisements, actual sales and conveyances and bills of sale, however, are to be made only by the said tax commissioner. Said deputies shall be required to give such bond as may be required by the tax commissioners. Such deputy or deputies shall have no power or authority except with respect to the levy of said tax fi.fas. and the collection of taxes, and shall hold the office of deputy at the pleasure of the tax commissioner. The tax commissioner shall be responsible for the acts of the deputy or deputies as sheriffs are now liable for the acts of their deputies.

"Section 4. All laws and parts of laws in conflict with this Act are hereby repealed."

Ga. Code Ann. § 92-5501

"Indebtedness to State, process of time. - If any tax receiver or tax collector shall receive commissions which he is not entitled to receive or retain, or in any other manner

becomes possessed of any money belonging to the State, or incurs any liability thereto, the State Revenue Commissioner is authorized to issue execution or other legal process against him."

STATEMENT OF FACTS

The facts relevant to the questions presented by this petition are uncontroverted and therefore may be introduced to the Court in a summary fashion.

The petitioner, Billy West Dasher, is the Tax Commissioner of Lowndes County, Georgia. In September 1970 the Lowndes County Grand Jury acting in a quasi-judicial capacity attempted to impose a penalty or fine in the amount of One Thousand, Twenty Eight and 59/100 ($1,028.59) Dollars against petitioner, Billy West Dasher, pursuant to Georgia Laws 1884-85, p. 66, Ga. Code Ann. §92-5106.

In October 1971, Lowndes County requested the Georgia Department of Revenue to enforce the penalty by issuance of execution against petitioner pursuant to Ga. Code Ann. §92-5501.

The petitioner was never served with a copy of any presentment of the grand jury prior to the return of the same by the grand jury. The petitioner was not afforded an opportunity to be present in the grand jury room during the presentment of the evidence nor was he afforded an opportunity to appear with

counsel at any time during which the grand jury had this matter under consideration.

Subsequently, petitioner filed his complaint in the Lowndes County Superior Court alleging the assessment of the penalty or fine agaisnt him by the Lowndes County Grand Jury violated the United States Constitution; and prayed that the assessment be declared null and void, and that the State Commissioner of Revenue and Lowndes County, Georgia, be enjoined from enforcing the void assessment, and that any derrogatory remarks about petitioner be expunged from the official records. The Superior Court of Lowndes County, Georgia, issued a decree declaring that the supplemental presentments of the 1970 grand jury of Lowndes County was null and void, and ordered the derrogatory language in the presentment be expunged from the official records. The decree of the trial court was grounded upon its finding that the Lowndes County Tax Commissioner was a state official entitled to the rights prescribed for state officials in Georgia Laws 1943, pp. 284, 287, Ga. Code Ann. §40-1617.

On appeal, the Supreme Court of Georgia held that the County of Lowndes was not a proper party defendant and for authority cited the case of Millwood v. DeKalb County, 106 Ga. 743, a tort case, apparently completely overlooking the fact that this case involves no tort but the violation of petitioner's constitutional rights, which would completely

disfranchise petitioner of his constitutional rights. If the doctrine of sovereign immunity was applicable to cases in which a party alleged a violation of his constitutional rights, then all of the protection sought to be provided for the individual in the United States Constitution against both the federal and state governments would be rendered void and ineffective.

The Georgia Supreme Court further held that the Lowndes County Tax Commissioner was not a state official withing the purview of Georgia Laws, 1943, pp. 284, 287, Ga. Code Ann. §40-1617, and therefore was not entitled to the rights provided for certain county officials, namely, notice, hearing and counsel, when charged with malpractice in office. The Georgia Supereme Court reversed the Lowndes County Superior Court. Without specifically ruling on the constitutional issues raised at both the trial and appellate levels, thus the Georgia Supreme Court in effect held that the procedure of the Lowndes County Grand Jury in levying the penalty or fine against petitioner and the action of Lowndes County, Georgia, in requesting the Georgia State Revenue Commissioner to enter execution on the levy was not an infringement of petitioner's constitutional rights as provided for in the Fourteenth Amendment to the United States Constitution.

The constitutional issues were raised in the first instance in petitioner's complaint filed in Lowndes County

Superior Court in Paragraph VII at pp. 2, 3, and reads as follows:

> "The attempt on the part of the defendant, Lowndes County, Georgia, to impose the fine or penalty upon plaintiff without benefit of a trial of the issues is in violation of plaintiff's constitutional rights as provided by the Constitution of the United States of America and the Constitution of the State of Georgia, and by the mere act of assuming public office the plaintiff surrendered no part of his rights as an individual to be protected against the infliction of a penalty or fine unless he has first been convicted under a valid statute defining the offense with sufficient definiteness and at the same time afforded an opportunity to offer evidence in defense of such penalty. Plaintiff further shows that at no time was he ever notified in writing by the defendant, Lowndes County, Georgia, that he was guilty of misfeasance, malfeasance, or non-feasance in office and at no time was he ever formally served with an official copy of any grand jury presentment except the presentment of the September, 1970, Grand Jury which then and there attempted to impose a fine or penalty upon the plaintiff and that at no time has the plaintiff received any official notice in writing or any written request from the defendant, Lowndes County, Georgia, having to do with or designed to encourage the plaintiff

to comply with any public law pertaining to delinquent taxes. Plaintiff further shows that the provisions of the presentments as entered from time to time by the grand juries pertaining to the plaintiff, including the September 1970 Grand Jury, are so vague and indefinite and uncertain that they do not place plaintiff on notice of any misfeasance, malfeasance or nonfeasance in office nor that a penalty might be imposed against the plaintiff at any future date; and, therefore, plaintiff shows and says that the present attempt on the part of the defendant, Lowndes County, Georgia, to impose a fine upon the plaintiff is void and without force and effect because of lack of due process of law and is in violation of the plaintiff's constitutional rights."

And in Paragraph VIII, at p. 3:

"Plaintiff was entitled to a hearing or trial as a matter of constitutional right and any attempt by statute to deprive the plaintiff of this right would be against public policy and would be unconstitutional in nature and the failure of the statute to provide for and preserve this right renders said statute void and unconstitutional. Georgia Code 92-5106 (Acts 1884-85, p. 66) is void for failure to protect the rights of the plaintiff in that it fails to provide for a trial, hearing, appeal or opportunity for plaintiff to be heard."

And in Paragraph XIV at p. 6:

> "Plaintiff is informed and believes that the present attempt by defendant, Lowndes County, Georgia, to impose a penalty or fine upon him as Tax Commissioner is an action which is original in nature and has never before been attempted against any of plaintiff's predecessors in office and that such action on the part of defendants is a product of ill-will and is politically inspired, amounting to an intentional or purposeful discrimination which is deliberately based upon unjustifiable allegations on the part of said defendants, to-wit: 'Plaintiff has ignored his duties or procrastinates in implementing grand jury presentments pertaining to the operation of his office and plaintiff has failed to comply with the provisions of Chapter 95-51 of the Code of Georgia.' Plaintiff says he is being fined, penalized, and embarrassed for the alleged commission of some otherwise harmless act which had not ordinarily been treated before with such harshness by the defendants, and said action on the part of the defendants amounts to an unconstitutional, discriminatory enforcement of a statute which has never heretofore been employed by defendants in a similar case."

And in the Amendment to plaintiff's complaint, Paragraphs IV and V, at pp. 2 and 3:

"Plaintiff amends his complaint by adding an additional paragraph to be numbered Paragrpah XVIII and to read as follows: Plaintiff shows that the attempt on the part of the defendant to impose the fine or penalty upon plaintiff without the benefit of a trial of the issues is in violation of the Fourteenth Amendment to the Constitution of the United States of America, which includes the stipulation that a State Government must not deny to any person within its jurisdiction the equal protection of the law. Plaintiff further shows that the Fifth Amendment to the United States Constitution declares that "no person shall be deprived of life, liberty, or property" without due process of law and that if required and compelled to pay the fine or penalty would be a violation of his rights provided and afforded him under the Fifth Amendment of the Constitution of the United States, and as provided by Article I, Section 2-103 of the Constitution of the State of Georgia, which says that "a citizen shall not be deprived of his life, liberty or property without due process of law."

"Plaintiff amends his complaint by adding an additional paragraph to be numbered Paragraph XIX to read as follows: Plaintiff further shows that the theory upon which our political institution rests is that all men have certain inalienable rights, and among these are life, liberty and pursuit of

happiness, and that in the pursuit of happiness all avocations, all honors, all positions are open to everyone and in the protection of these rights all are equal before the law, and any law which restricts the enjoyment of such rights is punishment and can be in no way be otherwise defined, and it is indeed a violation of the plaintiff's rights under the Fifth Amendment and the Fourteenth Amendment of the Constitution of the United States for the following reasons:

(a) Plaintiff was fined but was never afforded a hearing;

(b) Plaintiff received no notice or summons before the penalty or fine was imposed;

(c) No opportunity was provided for plaintiff to introduce witnesses;

(d) No opportunity was provided for plaintiff to be represented by counsel;

(e) The grand jury, in reaching the verdict that plaintiff be fined or penalized, relied upon hearsay evidence including newspaper editorials and newspaper reports which are mentioned in the Grand Jury Presentment;

(f) Plaintiff was not afforded his rights as a public official as provided by the Statutes of Georgia;

(g) The Grand Jury allegedly completed an investigation but the character of the investigation and how the results were arrived at remains a mystery."

The constitutional issues comprising a federal question giving this Court jurisdiction were also raised by petitioner in his brief to the Georgia Supreme Court, at pp. 4 and 5, as follows:

"The Tax Commissioner, appellee, was never served with a copy of any presentments by the Grand Jury prior to the return of same by the Grand Jury. The Tax Commissioner was not afforded an opportunity to be present in the grand jury room during the presentment of all of the evidence. The Tax Commissioner was not afforded an opportunity to appear with counsel at any time during which the Grand Jury had this matter under consideration. The penalty was imposed by the Grand Jury without affording the Tax Commissioner an opportunity to present evidence in rebuttal and in so doing deprived the Tax Commissioner of his right to equal protection under the law and failed to comply with so much of the law having to do with due process.

"The Court will note that the Grand Jury presentments were vague, uncertain, and indefinite and failed to set out or cite any violation on the part of the appellee in his capacity

as Tax Commissioner. The Court will also note that the Grand Jury presentment referred to the Valdosta Daily Times as a source of information, which, of course, is hearsay and reversible error.

"The Court will also note that the Grand Jury action was taken on November 2, 1970, but was not referred to the Commissioner of the State Department of Revenue until October, 1971, for collection, and, of course, the appellee contends that this delay was intentional and constitutes an attempt on the part of those involved to harm the appellee politically inasmuch as he must offer for re-election this year."

REASONS FOR GRANTING THE WRIT

The decision below directly conflicts with due process principles enunciated by the Court in the following cases: Fuentes v. Shevin, U.S. decided June 12, 1972; Bell v. Burson, 402 U.S. 535; Goldberg v. Kelly, 397 U.S. 254; Wisconsin v. Constantineau, 397 U.S. 985; In Re Murchison, 349 U.S. 133.

In Fuentes this court held the Florida prejudgment replevin statute was in conflict with the due process clause of the Fourteenth Amendment to the United States Constitution. This statute allowed the conditional vendor of personal property to obtain a prejudgment Writ of Replevin by summary ex parte application to the Clerk of the Court upon posting of bond

for double the value of the property to be seized.

In Bell petitioner's driver's license was suspended under a Georgia statute that allowed suspension at an administrative hearing if the licensee was uninsured and he was involved in an accident and failed to post bond to cover damages claimed by the other party to the accident. The petitioner was not allowed to offer any evidence on the issue of fault at the administrative hearing. This court held that the whole statutory scheme involved was built around fault and the failure to allow petitioner to offer evidence on this issue prior to the suspension of his driver's license was a violation of procedureal due process.

In Goldberg this court held that welfare benefits are statutory entitlements and due process requires that before such rights are terminated the recipient must have an evidentiary hearing with adequate and timely notice and opportunity to defend by confronting adverse witnesses and by presenting his own arguments before the decision maker.

In Wisconsin this court affirmed a three judge Federal District Court's holding a Wisconsin statute was contrary procedual due process. The statute allowed certain designated persons to proscribe the sale of alcoholic beverages to one who by excessive drinking habits demonstrated certain traits such as exposing himself or his family to want or becoming

dangerous to the peace of the community. The chief of police of Hartford, one of designated persons in the statute, without notice or hearing to appellee had a notice posted on all retail liquor outlets that the sale or gift of liquor to appellee was forbidden for one year. This court in affirming quoted the following from the opinion of the three judge Federal District Court:

> "In posting an individual, the particular city official or spouse is doing more than denying him the ability to purchase alcoholic beverages within the city limits. In essence, he is giving notice to the public that he has found the particular individual's behavior to fall within one of the categories enumerated in the statutes. It would be naive not to recognize that such posting or characterization of an individual will expose him to public embarrassment and ridicule, and it is our opinion that procedural due process requires that before one acting pursuant to state statute can make such a quasijudicial determination, the individual involved must be given notice of the intent to post and an opportunity to present his side of the matter. 302 F. Supp. at 864."

In In Re Murchison, this Court held a Michigan statute to be in violation of due process. Under this statute a Michigan judge served as a "one man grand jury" investigating crime. Later the same

judge, after a hearing in open court found two witnesses guilty of contempt and sentenced them to punishment for events which took place before the same judge in the grand jury proceeding.

The petitioner has been denied the due process of law in that the Lowndes County Grand Jury, acting as a quasi-judicial body, imposed a penalty or fine on the petitioner without affording him an opportunity to be present at the proceedings where he could rebut the evidence offered against him and present evidence in his own behalf. This court said in Fuentes at p. 12:

> "The constitutional right to be heard is as a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions."

The grand jury in this instance was not acting in its traditional role as a body considering the evidence against an individual for the purposes of determining whether the individual should be indicted and tried for certain acts, but rather it was acting as a fact finding body similar to a trial court with authority under state statute to impose a penalty on the petitioner based on the facts thus found. This court also said in Fuentes at p. 15:

> "... A court does not decide a dispute until it has had an opportunity to hear both sides - and does not

> generally take even tentative action until it has itself examined the support for the plaintiff's position." (emphasis supplied)

As this court said in Fuentes at p. 17, "any significant taking of property by the State is within the purview of the Due Process Clause," the levy of the penalty by the grand jury on the petitioner was a taking of a significant property and a clear violation of the Due Process Clause. Furthermore, as petitioner argued before the trial court and the Georgia Supreme Court, the action by Lowndes County and the Lowndes County Grand Jury was designed to case a derogatory reflection upon the petitioner's performance of his official duties and unjustly expose him to public embarrassment and ridicule at a time when he must offer for re-election if he was to maintain his job. It is noted that the fine or penalty was imposed by September 1970 Grand Jury but the County delayed collection until on the eve of the election in 1972. Therefore the action of the grand jury in making the derogatory remarks about the petitioner and causing the same to be spread upon the official record, and the timing of collection attempt by Lowndes County, was itself depriving the petitioner of a substantial property right within the penumbra of the Due Process Clause. And as was said in Fuentes at p. 13:

> "If the right to notice and hearing is to serve its full purpose, then,

> it is clear that it must be granted at a time when the deprivation can still be prevented."

Even arduendo if the right to hold public office is not a property right within the protection of the Due Process Clause, petitioner's case would come within the protection of the Due Process Clause outlined in Wisconsin, supra. The spreading of presentments of the grand jury on the official record, with the derogatory remarks charging petitioner with malpractice in office, was in effect to label him as being derlict in his duty and guilty of malpractice and thus an unfit office holder. Any such proceeding by an instrumentality of the State branding an individual as such comes within the scope of the Due Process Clause of the Fourteenth Amendment to the United State Constitution.

The petitioner in the instant case is in a very similar position to that of the petitioner in Bell, supra. This court held in Bell that a Georgia statute, allowing an administrative body to suspend a driver's license without affording the licensee an opportunity to be heard on the issue of fault, was a violation of due process. The petitioner in the instant case is in a similar position in that the penalty or fine imposed on him was based on the alleged misconduct of the petitioner in his official capacity, and therefore under due process petitioner was entitled to a hearing on the issue of misconduct.

As this court held in Goldberg, supra, the petitioner under due process was entitled to an evidentiary hearing with adequate and timely notice and opportunity to defend by confronting adverse witnesses and by presenting his own arguments and evidence orally before the decision maker. The petitioner in the instant case was not only denied the right of notice and hearing and opportunity to present evidence personally or by counsel, but was penalized on evidence taken from a local newspaper.

It cannot be argued that the levying of the penalty by assessment by the grand jury was not a taking of property within the protection of due process in that petitioner would be afforded a hearing when execution was issued on the assessment. A later hearing would not suffice if the facts have already been determined at a time when the one against whom the penalty or punishment is imposed was not afforded an opportunity to present evidence at such fact finding proceeding as was enunciated by this court in In Re Murchison, supra.

CONCLUSION

The Lowndes County Grand Jury in this quasijudicial fact finding and penalty imposing proceeding violated petitioner's rights to substantive and procedural due process and equal protection as provided in the Fourteenth Amendment to the Constitution of the United States. For these

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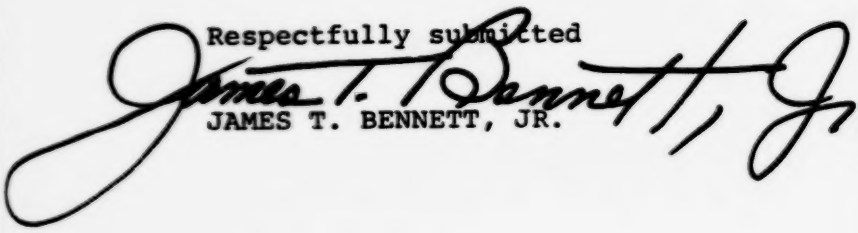
reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Georgia Supreme Court.

Respectfully submitted



JAMES T. BENNETT, JR.

Please serve:

James T. Bennett, Jr.
Bennett, Saliba & Yancey
P. O. Box 1685
118 West Hill Avenue
Valdosta, Georgia 31601

O CLOSE IN CENTER

CERTIFICATE OF SERVICE

This is to certify that I have this day served true and correct copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Georgia, by mail, by depositing the same in a United States mail box, with first class postage prepaid, addressed to each of the following, who constitute all counsel of record:

H. Arthur McLane, Esquire
504 North Patterson Street
Valdosta, Georgia 31601

Richard L. Chambers, Esquire
Assistant Attorney General
Judicial Building
Atlanta, Georgia 30334

George A. Horkan, Jr.
District Attorney
P. O. Box 682
Moultrie, Georgia 31768

This 13th day of September, 1972.
All parties required to be served have been served.

James T. Bennett, Jr.
JAMES T. BENNETT, JR.

APPENDIX A

709

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In The Supreme Court of Georgia

Decided: June 15, 1972

27202. LOWNDES COUNTY v. DASHER et al.

27203. STEELE v. DASHER et al.

JORDAN, Justice. A Lowndes County grand jury, citing Code § 92-5106, imposed a penalty of $1,028.59, 1% of the delinquent taxes due on August 30, 1970, per report of the County Auditor, on the Lowndes County Tax Commissioner. The State Revenue Commissioner, citing Code § 92-5501, issued execution, adding to the penalty an additional 20% for failure to pay, as provided under Code § 92-5106, plus 7% per annum interest until paid. Dasher, the Tax Commissioner, sought injunctive and other relief, including a motion to expunge the records of the grand jury presentments relative to imposition of the penalty.

The trial judge declared the presentments void and of no effect, and ordered certain language of the presentments expunged from the records. Lowndes County and Steele, the Foreman of the grand jury, appeal from this order. Held:

1. Lowndes County insists on appeal that the trial judge should have dismissed the claim in respect to the county as a party for lack of jurisdiction of the court to entertain a claim of this nature against the county. If this contention be valid, it would follow that the order is, in respect to the county, a nullity.

"The judgment of court having no jurisdiction of the person or subject matter, or void for any other reason, is a mere nullity, and may be so held in any court when it becomes material to the parties to consider it." Code § 110-709. Also, see Code Ann. § 81A-160 (a).

A county is a body corporate with such powers as may be prescribed by law. Art. XI, Section. I, Par. I, Constitution of 1945; Code Ann. § 2-7801. As a body corporate it may sue or be sued. Code Ann. § 23-1501. But it is not liable to suit for any claim unless made so by statute. Code § 23-1502. "The county, being a political subdivision of the State, is not liable to be sued, unless special authority can be shown, and it is incumbent upon the person filing the suit to bring his case within the legislative authority upon which he relies." Millwood v. DeKalb County, 106 Ga. 743 (32 SE 577).

After extensive research and a study of the records and briefs we find no authority expressly or by implication which authorizes the plaintiff to bring the present action against Lowndes County. Accordingly, we conclude that the trial judge was without authority to act in respect to Lowndes County as a party defendant except to order dismissal of the claim. This being controlling in respect to Lowndes County, it is unnecessary to consider the remaining enumerations of error in Appeal No. 27202.

2. The foregoing, however, does not invalidate the order in respect to Steele, the foreman of the grand jury which made the presentments which the order purports to nullify, who, as a party defendant in the lower court, has standing to appeal the order under Code § 6-901, as amended; Ga. L. 1965, pp. 18, 40. We thus proceed to a consideration of the errors asserted in Appeal No. 27203.

3. It appears to be uncontroverted that the Tax Commissioner was not served with any proposed presentments or allowed to appear before the grand jury, but contrary to the opinion of the trial judge the Tax Commissioner of Lowndes County is not a State official who, under the statutory provisions set forth in Code Ann. § 40-1617 is entitled to the rights set forth in Code Ann. § 89-9908, and the presentments were not void for failure to comply with these statutory provisions. Under these statutes

before an indictment charging any State official shall be laid before a grand jury charging misfeasance or malfeasance in office (and here there was no indictment) the official is entitled to be served with a copy of the proposed indictment and to appear with counsel before the grand jury and present evidence, including a sworn or unsworn statement.

It is clear that the General Assembly had authority to consolidate the offices and duties of tax receiver and collector in any county in one official, "to be known as county tax commissioner." Art. XI, Sec. III, Par. I, Constitution of 1877, as amended; former Code § 2-6407. The General Assembly, acting pursuant to this authority, consolidated the offices and duties in Lowndes County in one official, to "be known as 'Lowndes County Tax Commissioner.'" Ga. L. 1931, pp. 518, 519. That a tax commissioner is a county officer is implicit from the placement and language in the Constitution of 1877, as amended, supra, and the same authority under Article XI, Section I, Paragraph VI of the Constitution of 1945; Code Ann. § 2-7806. See Houlihan v. Saussy, 206 Ga. 1 (55 SE 557); Laurens County v. K-en, 214 Ga. 32 (102 SE2d 697).

4. This court finds no basis to support the conclusion of the trial judge that the presentments were void. Here the grand jury acted pursuant to specific statutory authority, and the

presentments reflect nothing more than the action of the grand jury pursuant to its authority under Code § 92-5106 plus additional statements in explanation and support of its action. The case as here disclosed does not come with the rule expressed in Kelley v. Tanksley, 105 Ga. App. 65 (123 SE2d 462), relative to the right of a public officer to have remarks charging or casting reflections of misconduct or impugning his character expunged from the record in the absence of express statutory authority, except by presentment or true bill of indictment charging a specific offense.

Judgment reversed. All the Justices concur.

APPENDIX B

IN THE SUPERIOR COURT OF LOWNDES COUNTY

STATE OF GEORGIA

Billy West Dasher,	:	
	:	
Plaintiff,	:	CIVIL ACT-
	:	
vs.	:	TION NO.
	:	
John A. Blackmon, Commissioner, State Department of Revenue, and Lowndes County, Georgia, and Frank S. Steele, Foreman of The Lowndes County Grand Jury, September Term, 1970.	:	2833
	:	
Defendants.	:	

JUDGMENT OF THE COURT

The above case coming on for hearing before the Court without a jury on January 4, 1972, and the court having heard and considered the evidence, the pleadings, and the stipulations of the parties, make the following:

FINDINGS OF FACT

The plaintiff, Billy West Dasher, is a duly elected and qualified tax commissioner of Lowndes County, duly commissioned by the Governor of the State

of Georgia.

The Lowndes County Grand Jury for the September Term, 1970, made presentments to the Court on the 10th day of September, 1970, which contained the following language:

> "It is apparent that previous and present Grand Jury presentments have had little affect in the matter of collection of outstanding delinquent taxes in Lowndes County. Obviously, there is little to indicate that future presentments will have any different affect, and, certainly, the general business and accounting procedures in the office of Tax Commissioner are extremely lax. It appears to this Committee that the Tax Collector should be reasonably aware of all tax balances due his office at any and all times. However, when appearing before this Grand Jury in September, the Tax Commissioner advised us that between $40,000 and $50,000 was due the County in delinquent taxes, when a simple audit requested by this Committee thru the County Auditor determined that $102,859.66 was over-due for the years 1946 thru 1968. (Copy of audit attached). Please note how the accounts receivable have increased during the nine-years-term of the present Tax

Commissioner. Recall, too, the Tax Commissioners statement before this Jury that he has never levied on a single piece of property during his term in office, even though full authority to proceed in this direction is clearly spelled out in the law. Following our September meeting, the Tax Commissioner did mail a tax delinquent notice to some 600 tax delinquent individuals in Lowndes County (copy of notice attached) and, as of October 28, 1970, this notice, plus local newspaper coverage (attached) has brought in $29,695.17, leaving a present balance of $73,064.49. It is assumed that the Tax Commissioner has been quoted correctly, particularly in regard to a September 23rd, 1970, Valdosta Times article in which he is quoted as stating that "he plans to start advertising property for sale for non-payment of taxes either the end of this week or next week." The fact that this has not been done further indicates a lack of sincerity on his part in the treatment of Lowndes County citizens who pay their taxes vs. those who do not."

Thereafter the Grand Jury on November 2, 1970, made a supplemental presentment which contained the following language:

"Since the Tax Commissioner has ignored or procrastinated in implementing the presentments

pertaining to the operation of his office made by Grand Juries in November, 1968 - May, 1969 - November, 1969 - June, 1970, and since he has, specifically, failed to conform to, and abide by, the provisions of Chapter 92-51 of the Code of Georgia, we, the September, 1970, Lowndes County Grand Jury, under Georgia Code No. 92-5106, do penalize the Tax Commissioner $1028.59 of his commissions as prescribed under the Code.

"This Penalty is based on 1% of $102,859.66 which is the amount of Delinquent Taxes due on 8/30/70 according to the County Auditor. (see attached sheet)"

No copy of the proposed presentments by the Grand Jury were presented to the plaintiff prior to their return nor was the plaintiff afforded an opportunity to be present in the Grand Jury room during the presentation of all evidence in this matter nor was he afforded an opportunity to appear with counsel during such presentation.

After the return of these presentments by the September, 1970, Grand Jury of Lowndes County the governing officials of Lowndes County notified John A. Blackmon, State Revenue Commissioner, and requested that he collect the penalty accessed against the plaintiff.

In accordance with the request the State Revenue Commissioner requested payment of the penalty of the plaintiff and stated that if payment was not made further proceedings would be had in conformity with the law.

Thereafter the plaintiff filed an action in this Court requesting that the Revenue Commissioner be enjoined from proceeding with this matter and further requested that the presentments of the Grand Jury relating to the operation of his office and the penalty accessed against him be expunged from the records of this Court.

The evidence indicated that the tax commissioner of Lowndes County, Georgia, is elected by the people of Lowndes County, Georgia and that he collects both State and county taxes.

CONCLUSION OF LAW

That the plaintiff as the duly elected and qualified tax commissioner of Lowndes County, Georgia, is a State Official within the meaning of Section 40-1617 of the Code of Georgia 43 (Acts of 1943, page 234).

In this connection it is noted that the Supreme Court of Georgia has held that public officers of this State are its officers which the law requires to commissioned by the Governor. (Abram vs. State of Georgia, 121 Ga., page

170). This case holding that since a Justice of the Peace was required to be commissioned by the Governor that he was a State Officer.

Section 92-4701 of the Code of Georgia states that a tax collector shall be commissioned and qualified as clerks of the superior courts are commissioned and qualified.

The Court takes judicial cognizance that Clerks of the Superior Court are commissioned by the Governor of the State. The Court points out that none of the able attorneys for the parties in this case have quoted any cases arising in Georgia or elsewhere directly touching upon the question as to whether or not a tax commissioner is a State or county officer. The Court has not been able to locate any cases in Georgia but notes that the Supreme Court of Kentucky on two separate occasions ruled that a county tax commissioner is a State Officer (Jefferson County vs. Targer, 194 SW 851, 302K362) (Talbott vs. Burke 152 SW 586, 287K187).

That the presentments of the September, 1970, Grand Jury in reference to the plaintiff and his office were not served upon the plaintiff in compliance with Sections 40-1617 and 89-9908 of the Code of Georgia and are consequently void and of no effect.

The Court further concludes as a

matter of law that much of the language contained in the said presentments is unnecessary to effect the purposes of Section 92-5106 of the Code and that the following language of said presentment should be expunged for that reason:

> "It is apparent that previous and present Grand Jury presentments have had little affect in the matter of collection of outstanding delinquent taxes in Lowndes County. Obviously, there is little to indicate that future presentments will have any different affect, and, certainly, the general business and accounting procedures in the office of Tax Commissioner are extremely lax. It appears to this Committee that the Tax Collector should be reasonably aware of all tax balances due his office at any and all times. However, when appearing before this Grand Jury in September, the Tax Commissioner advised us that between $40,000 and $50,000 was due the County in delinquent taxes, when a simple audit requested by this Committee thru the County Auditor determined that $102,859.66 was over-due for the years 1946 thru 1968. (Copy of audit attached). Please note how the accounts receivable have increased during the nine-years-term of the present Tax Commissioner. Recall, too, the

Tax Commissioners statement before this Jury that he has never levied on a single piece of property during his term in office, even though full authority to proceed in this direction is clearly spelled out in the law. Following our September meeting, the Tax Commissioner did mail a tax delinquent notice to some 600 tax delinquent individuals in Lowndes County (copy of notice attached) and, as of October 28, 1970, this notice, plus local newspaper coverage (attached) has brought in $29,695.17, leaving a present balance of $73,064.49. It is assumed that the Tax Commissioner has been quoted correctly, particularly in regard to a September 23rd, 1970, Valdosta Times article in which he is quoted as stating that "he plans to start advertising property for sale for non-payment of taxes either the end of this week or next week." The fact that this has not been done further indicates a lack of sincerity on his part in the treatment of Lowndes County citizens who pay their taxes vs. those who do not."

The Court finds further that the following words appearing in the supplimental presentments of November 2, 1970, are not necessary to effect the purpose of 92-5106:

"...ignored or procrastinated in

implementing the presentments pertaining to the operation of his office made by Grand Juries in November, 1968 - May, 1969 - November, 1969 - June, 1970, and since he has..." (Kelly vs. Tanksley, 105 Ga. App. page 65).

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED that the supplemental presentments of the September, 1970, Grand Jury of Lowndes County set forth above including the supplemental presentment of November 2nd, 1970, are hereby declared to be void and null and of no effect.

Further Ordered that the Clerk of this Court expunge said language from said presentments and from the official records of this Court.

SO ORDERED THIS 4th DAY OF FEBRUARY, 1972.

/s/ Marcus B. Calhoun
JUDGE, SUPERIOR COURT
OF THE SOUTHERN JUDICIAL
CIRCUIT OF GEORGIA.

COPY

DEC 13 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1972

NO. 72-448

BILLY WEST DASHER,

Petitioner,

V.

JOHN A. BLACKMON, COMMISSIONER, STATE DEPARTMENT OF REVENUE, and LOWNDES COUNTY, GERGIA, and FRANK S. STEELE, FOREMAN OF LOWNDES COUNTY GRAND JURY, SEPTEMBER TERM, 1970,

Respondents

Response To

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

H. ARTHUR McLANE
Counsel for Respondents,
Lowndes County, Georgia and
Frank S. Steele

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P. O. Box 505
Valdosta, Georgia 31601

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-448

BILLY WEST DASHER, Petitioner

Vs.

JOHN A BLACKMON, COMMISSIONER, STATE DEPARTMENT OF REVENUE, and LOWNDES COUNTY, GEORGIA, and FRANK S. STEELE, FOREMAN OF LOWNDES COUNTY GRAND JURY, SEPTEMBER TERM, 1970.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA, BY LOWNDES COUNTY, GEORGIA and FRANK S. STEELE, FOREMAN OF LOWNDES COUNTY GRAND JURY, SEPTEMBER TERM, 1970

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TABLE OF STATUTES

In addition to the statutes set forth in Petitioner's brief, the follow-int statutes are involved in a determination of the case sub judice:

GEORGIA LAWS 1889, p. 52; Acts 1823, Cobb 1025 (GA. CODE ANN. §92-5504)

> "State Revenue Commissioner to issue executions against collector and sureties on default. If any collector shall fail to settle his accounts with the State Revenue Commissioner in terms of the law, he shall issue execution against such collector and his sureties for the principal amount, with interest at the rate of 20 per cent per annum on said amount: Provided, that if upon a final settlement it shall appear that said collector was entitled to credits at the time he is required by law to settle, the Commissioner may allow the same, and charge interest only on the amount for which the collector is in default, together with all the costs and attorney's fees incurred by reason of the issuance of said execution."

GEORGIA LAWS 1915, p 55 (GA CODE ANN. § 92-5505)

"Affidavit of illegality to execution against tax collector and sureties. - Whenever the State Revenue Commissioner shall issue an execution against any defaulting tax collector and the sureties on his official bond, as set forth in section 92-5504, the tax collector or any surety on his bond may, at any time after the issuance of said execution and before a sale thereunder, file an affidavit of illegality to said execution, which affidavit shall state any matters of defense which would be available in denial either of the alleged default or the amount thereof as stated in the execution, and which affidavit shall be returned to be tried in and disposed by the superior court of the county in which the tax collector held office, in the same manner as provided by law for the trial and disposition of such issues generally."

GEORGIA LAWS 1895, p.63 (GA. CODE ANN. §89-9907).

"Malpractice, oppression and tyrannical partiality.- Any ordinary, member of any board of commissioners, county judge, or justice of the peace, who shall be charged with mal-

practice in office, or with using oppression or tyrannical partiality, or with wilfully refusing or failing to preside in or hold his court at the regular terms thereof or when it is his duty under the law to do so, or with using any other means to delay or avoid the due course or proceeding of law, or with any other conduct unbecoming the character of an upright magistrate, or who shall wilfully and knowingly demand more cost than he is entitled to by law, in the administration and under color of his office, shall be punished as for a misdemeanor and shall be removed from office."

GEORGIA LAWS 1863-63, pp.72,73 (GA. CODE ANN. §23-1501).

"Every county as body corporate. - Every county is a body corporate, with power to sue or be sued in any court."

CODE OF GEORGIA, 1933, §23-1502 (GA. CODE ANN. §23-1502).

"When county liable to suit. - A county is not liable to suit for any cause of action unless made so by statute."

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I. STATEMENT OF THE CASE

In paragraph 2 of petitioner's Statement of Facts, it is alleged that the Grand Jury of Lowndes County imposed a "penalty or fine" against the petitioner, (Petitioner's Brief, p. 9). While it is true that the term "penalize" was used in the Grand Jury presentments, the amount provided by the presentments was, rather, a forfeiture, as set forth in the applicable code section.

In paragraph 4 of petitioner's Statement of Facts, it is alleged that the petitioner was not afforded an opportunity to be present in the grand jury room during presentment of evidence and that he was not afforded an opportunity to appear with counsel at any time during which the grand jury had the matter under

consideration, the implication being that he was totally unaware of the question being considered. As a matter of fact, however, presentments had been made by grand juries prior to the September, 1970, term, noting the matter of outstanding delinquent taxes. No specific reference was made to any appearance of the Petitioner before grand juries prior to the September, 1970, term, but the petitioner had appeared before the previous grand juries and his appearance before the Grand Jury for the September, 1970, term is specifically noted in the presentments for that term and, by reference, incorporated into the judgment of Lowndes Superior Court. (Petitioner's Brief, Appendix, p. 7B). The respondents wish to emphasize, as is pointed out by the Petitioner, that neither the Lowndes County Superior Court nor the Supreme Court of Georgia passed upon the constitutional issues. (Petitioner's

Brief, p. 11).

The remaining facts necessary for a determination of the instant case are essentially as outlined by the Petitioner.

SUMMARY OF ARGUMENT

I. There being no substantive federal question involved in the instant case, and there having been no determination of any constitutional questions by the lower courts, this Court should deny the Writ of Certiorari. Pages 6-10

II. There was no final determination of liability of the Petitioner, Billy West Dasher, at the time of the action of the September, 1970, Grand Jury, and there was, therefore, no denial of due process to the Petitioner. Pages 11-26

III. Lowndes County having had no control over the proceedings of the September 1970, Grand Jury, and no control over the proceedings subsequent to the action of the September, 1970, Grand Jury, it was not a proper party to the instant case. P.26-32

IV. The law under which the September, 1970, Grand Jury acted being available to all grand juries in Georgia, and

the law also being applicable to all Tax Commissioners or Tax Collectors in the State of Georgia, the mere enforcement of the statute does not violate the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States. Pages 33-35

ARGUMENT AND CITATION OF AUTHORITY

I. There being no substantive federal question involved in the instant case, and there having been no determination of any constitutional questions by the lower courts, this Court should deny the Writ of Certiorari.

A. The Federal Question

> "Final Judgments...by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court...[b]y writ of certiorari...where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution...of the United States..."28 U.S.C. §1257(3)

The Supreme Court will, though, review a decision of a state court only if it affirmatively appears from the record that a federal question was presented to the highest court having jurisdiction,

and that the court's decision on the federal question was necessary to the determination of the case. *Durley v. Mayo*, 351 U.S. 277, 76 S. Ct. 806 (1956). And the federal question must actually have been decided, or it must appear that the judgment as rendered could not have been given without deciding the federal question. *Southwestern Bell Telephone Co. v. State of Oklahoma*, 303 U.S. 206, 58 S. Ct. 528 (1938). For where it appears that the judgment of the highest court might have rested on a non-federal basis, the Supreme Court will not review the judgment. *Stembridge v. Georgia*, 343 U.S. 541, 72 S. Ct. 834 (1952).

B. Raising the Question, and Decision Thereon. The burden of properly raising the federal question rests on the party alleged to be aggrieved, and when the highest state court has failed

to pass on a federal question, there is a presumption that the failure was owing to a want of proper presentation in the state courts, unless the contrary can be affirmatively shown. *Street v. New York*, 394 U.S. 576, 89 S. Ct. 1354 (1969). And if the issue was not presented to the state courts in such a manner as to make necessary a decision by the highest state court, the United States Supreme Court will not consider the issue. *Ibid.* The United States Supreme Court will not review what the state court did not decide. *Walters v. City of St. Louis*, 347 U.S. 231, 74 S. Ct. 505 (1954); *Dothwell v. Brickbee-Mears Co.*, 275 U.S. 274, 48 S. Ct. 124 (1927). In the case sub judice, there were allegations of unconstitutionality, but they did not set forth with sufficient particularity and clarity the particular sections of the Constitution

alleged to be violated, nor in what way the provisions of the Constitution were violated and the allegations did not, therefore, constitute a proper raising of the federal question. See: *West v. Frick Co.*, 183 Ga. 182, 187 S.E. 868 (1917); *Head v. Edgar Bros. Co.*, 187 Ga. 409, 200 S.E. 792 (1939); *Manufacturer's Trust Co. v. Wilby-Kinsey Service Corp.*, 204 Ga. 273, 49 S.E. 2d 514 (1948); *Aiken v. Richardson*, 207 Ga. 735, 64 S.E. 2d 54 (1951), error transferred 85 Ga. App. 180, 68 S.E. 2d 228, appeal dismissed 344 U.S. 802, 73 S.Ct. 15, rehearing denied 344 U.S. 905, 73 S.Ct. 282. The question must have been raised in the trial court, a ruling must have been made on the question, and it must be brought to the highest court of the state for review. *Aiken v. Richardson, op cit. supra.* Nor was any federal question passed upon in the Supreme Court of Georgia. And if it

appears that the judgment may have rested on a non-federal ground, and such ground was not used to evade the federal question, the Supreme Court of the United States should not review the judgment. *Stembridge v. State of Georgia, supra.*

II. There was no final determination of liability of the Petitioner, Billy West Dasher, at the time of the action of the September, 1970, Grand Jury, and there was, therefore, no denial of Due Process of Law to the Petitioner.

A. The State Law. GEORGIA LAWS 1895 p 63 (GA. CODE ANN. §89-9907) provides that:

> "...any ordinary, member of any board of commissioners, county judge, or justice of the peace, who shall be charged with malpractice in office, or with using oppression or tyrannical partiality, or with wilfully refusing or failing to preside in or hold his court at the regular terms thereof, or with using any other means to delay or avoid the due course or procedding of law..."

shall if convicted of such charges, be punished as for a misdemeanor and removed from office. And GEORGIA LAWS 1967, pp 858, 859 (GA. CODE ANN. §89-9908) provides for notice and an opportunity for

statement and appearance before the grand jury. GEORGIA LAWS 1943, pp 284, 287 (GA. CODE ANN. § 40-1617) extends these rights to state officials. There is not, however, any indication of any intent, legislative or judicial, to extend these rights to any parties other than those specified. The legislative intent as to the county officials who are entitled to the benefit of the section is clear, for it specifically names certain officials, and specifies the charges under which they may exercise the privileges. GEORGIA LAWS 1895, p 63 (GA. CODE ANN. §89-9907). And the applicable privileges to be exercised refer to "the preceding section". GEORGIA LAWS 1967, pp 858, 859 (GA. CODE ANN. § 89-9908)

A county officer is one who: (1) is elected by the qualified voters of the county; (2) holds his office for four

years; (3) is removed from office upon conviction of malpractice; (4) has been a resident of the county for two years; and (5) is a qualified voter. GA. CODE ANN. §2-7901. The Petitioner, the Tax Commissioner of Lowndes County, clearly fits all of such requirements, and he is, therefore, a county official. As a county official, he is not a state official as contemplated by the Constitution of the State of Georgia. GA. CODE ANN. §2-3101. And while county officers have been referred to as constitutional officers, they still are not "elective officers" within the meaning of the Constitution. GA. CODE ANN. §2-2301; *Houlihan et. al. v. saussy et. al*, 206 Ga. 1,5; 55 S.E.2d 557 (1949). Thus, a Clerk of the Superior Court is a county officer. *McGill v. Simmons*, 172 Ga. 127, 157 S.E. 273 (1931). And a member of the

board of commissioners is a county officer. *Sweat et. al. v. Barnhill et. al*, 171 Ga. 294, 157 S.E. 273 (1930). County officers include the Ordinary, the Clerk of the Superior Court, the Sheriff, the Tax Receiver and the Tax Collector. *Houlihan et. al. v. Saussy et. al.*, 206 Ga. 1, 55 S.E.2d 557 (1949); GA. CODE ANN. §2-7902; *Laurens County v. Keen*, 214 Ga. 32, 102 S.E.2d 697 (1958). Thus, since the Petitioner is not a state official, he cannot rely on the provisions of Code Section 40-1617; and the privileges afforded by Code Sections 89-9907 and 89-9908 must be afforded to him, if at all, in his capacity as a county official. But Petitioner is not entitled to the benefits of Code Sections 89-9907 and 89-9908, first of all, because he is not an official designated in Code Section 89-9907 as one entitled to the benefits of the

sections. See: *Jones v. Mills*, 216 Ga. 616, 118 S.E.2d 484 (1961).

Secondly, Petitioner is not entitled to the benefits of Code Section 89-9907 and 89-9908 for the reason that he was not charged with an act specified in Section 89-9907. Section 89-9907 and 89-9908 refer to, and apply to, only certain specified offenses, and if Petitioner was not charged with one or more of the specified offenses, he is not entitled to the benefits of the sections. An official, otherwise entitled to the benefits of the code sections, will not be afforded the sections if he is charged with some crime or act other than malpractice or some act particularly specified in Code Section 89-9907. *Clinkscales v. State*, 102 Ga. App. 670, 675, 117 S.E.2d 229 (1960); *Abercrombie v. State* (No. 46462, Court of Appeals, January 10, 1972). For Code

Sections 89-9907 and 89-9908 primarily "...relate to malpractice of certain [emphasis mine] county officers...and the manner in which they are prosecuted." *Sweeney v. Balkam*, 219 Ga. 292, 293, 133 S.E.2d 10 (1963).

Petitioner was not entitled to the provisions of Code Sections 40-1617, 89-9907 and 89-9908 because (1) he is not a state official; (2) he is not a county official designated in the code sections; and (3) he was not charged with some act specified by the code sections.

The Petitioner, by virtue of Georgia Laws 1931, p. 518, et. seq., is charged with the combined duties of Tax Receiver and Tax Collector.

> "Sec. 8. Said tax commissioner whether elected or appointed, shall perform each, every and all of the duties now required by law of both the tax collector and tax receiver of Lowndes County Georgia, and in the manner prescribed by law; shall be subject

> to all the pains and penalties, and have all the rights, powers, and privileges of said two offices and officers."

A grand jury "...has no right in the absence of specific statuatory authority [emphasis mine] to return a report charging or casting reflections of misconduct in office upon a public officer or impugning his character, except by presentment or true bill of indictment..." *Kelly v. Tankesley*, 105 Ga. App. 65, 123 S.E.2d 462 (196.). That case went on to say "This is not to infer, however, that the Grand Jury in exercising the investigative powers of a civil nature, specifically delegated to it by statute, may not make fair reports of its findings, even though such reports of necessity incidentally reflect negligence or incompetence, upon the officials involved." *Id.* at 66. Thus the grand jury in the instant case could make fair reports of

its findings, even though those findings might incidentally reflect negligence or incompetence on the Petitioner, even without statuatory authority. But there is statuatory authority for the action of the grand jury. The grand jury is charged with the duty of inspecting the books and records of the Tax Commissioner, and with reporting thereon by general or special presentment. GA. CODE ANN. §92-5105; *and see* §§59-301, 59-315, 59-601, 92-4908. And if the grand jury, upon inspection of the Tax Commissioner's books and records, finds a violation or failure to perform, they may assess a penalty against the Tax Commissioner. GA. CODE ANN. §92-5106.

Code Section 92-5106 provides the specific statuatory authority, required by the *Tankesley* case, for the action of the grand jury. The presentments made by the grand jury were authorized by both the

general laws of the state providing for report and presentment on the condition of the various county offices and by the provisions of Code Chapter 92-51 for the assessment of the penalty in the event of sub-standard action, or non-action, on the part of the Tax Commissioner. Thus, even though the presentments and penalty, brought by the statuatory authority required by the *Tankesley* case, may necessarily reflect or infer negligence or incompetence on the part of the Petitioner, they do not charge him with malpractice or some other act specified by Code Section 89-9907, and they are within the bounds of the *Tankesley* case. The grand jury should not have assessed the penalty against Petitioner without a setting forth of the grounds and reasons for the action and, having found the conditions which justified the penalty authorized specifically by statute, they

should have, and did, make a fair report, by presentment, on the condition which resulted in the penalty assessment. The only substantive objection made by the Petitioner to the presentments goes, not to the truth or accuracy of the conditions found by the grand jury, but to the simple reference to an assumed quotation relative to proposed tax sales. It has been nowhere shown that the facts set forth in the grand jury presentments are, in any way, untruthful or inaccurate, and it cannot be reasonably argued that a truthful setting forth of facts, in a grand jury presentment, could be said to be excessive or unnecessary. On the contrary, Respondents submit that the grand jury would itself have been negligent had it not found, and shown by presentment, sufficient facts to authorize and justify the penalty it assessed against the Petitioner.

But Petitioner's liability was not fixed, nor even necessarily determined, upon the issuance of the grand jury's actions. Upon the happening of that event, the Petitioner could either have paid the forfeiture or he could have, as he did, done nothing. If the Tax Commissioner who is made subject to the action of a grand jury fails to pay the penalty imposed, it is enforced against him and his securities by the State Revenue Commissioner, under the provisions relative to defaulting tax collectors, with twenty percent penalty of the amount to be forfeited added thereto. GA. LAWS 1884-85, p.86 (GA. CODE ANN. §92-5106). The State Revenue Commissioner issues his execution against the Tax Commissioner for the amount specified. Acts 1823, Cobb 1025, GEORGIA LAWS 1889, p.52 (GA. CODE ANN. §92-5504). But at any time after the

issuance of the execution and before any sale under the execution, the Tax Commissioner may file an affidavit of illegality to the execution, setting forth any defenses he may have to the execution, and the matter is then tried in the superior court of the county in which the tax collector held office. GEORGIA LAWS 1915, p.55 (GA. CODE ANN. §92-5505). At the time of the grand jury's action, then, the liability of the Petitioner was no more than that of an individual who has been sued in a civil suit or who has been made the subject of a true bill of indictment. In both cases, upon a later hearing of the matter, the defendant or the person against whom the true bill of indictment is returned may be completely exonerated.

B. Due Process. Throughout his argument, Petitioner seems to be assuming that

the action of the grand jury, in assessing a penalty under Georgia Laws 1884-85, p.86 (GA. CODE ANN. §92-5106), automatically and irrevocably fixes his liability, without recourse. But, as pointed out in Paragraph A above, this is simply not the case. Even after notification, by whatever means, of the grand jury's action, Petitioner could simply ignore the forfeiture. If he continued to ignore it, the State Revenue Commissioner may, and did, issue execution against him, under clear statuatory authority. But even then the Tax Commissioner's liability is not fixed for he may, by a reasonable pursuit of his rights, and before a sale or seizure of any of his property, file the requisite affidavit of illegality, and have the matter submitted for a full evidentiary hearing. Due process of law does not necessarily require a judicial

procedure. *Pittsburgh Railway Company v. Backus*, 154 U.S. 421, 14 S.Ct. 1114 (1894); *Turpin v. Lemon*, 187 U.S. 51, 23 S.Ct. 20 (1902).

> "The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice and opportunity to be heard and to present his claim as defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it."

Reetz v. Michigan, 188 U.S. 505, 508, 23 S.Ct. 390 (1903). *And see: McDonald v. Oregon Railroad and Navigation Co.*, 233 U.S. 665, 34 S.Ct. 772 (1914). The right to notice and an opportunity to be heard must, of course, be "granted at a meaningful time and in a meaningful manner". *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187 (1965). But the statute here grants the right to a hearing under the proper circumstances. Opportunity is

given for a full evidentiary hearing prior to any sale or deprivation of property; it is given before the final liability of the Tax Commissioner is fixed; and it is given under circumstances where it is possible for the Tax Commissioner to raise any defense to the matter he deems appropriate. The requirements of due process are met. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). It is, of course, true that a procedural rule that may satisfy due process in one context may not necessarily satisfy due process in every case. *Bell v. Burson*, 402 U.S. 535 (1971). But it is also true that in special circumstances, or under special conditions, special rules of procedure may be involved without denying due process. *Boddie v. Connecticut*, 401 U.S. 371 (1971);

Bell v. Burson, 402 U.S. 535 (1971); *Phillips v. Commissioner*, 283 U.S. 589 (1931); *Central Union Trust Co. v. Garvan*, 254 U.S. 554 (1921); *Fahey v. Mallonee*, 332 U.S. 245 (1947). The continued, legal, efficient operation of a governmental office, particularly involving the collection of revenues which form the great percentage of operatirg revenues for a county, is a special circumstance, requiring the utmost in diligence and attention to legal duty. When that standard is not met, there must be resources to cope with the situation. The code sections allowing the forfeiture provide such a means, and, by providing for the affidavit of illegality and a hearing, before an impartial body, they provide such a means within the framework and intent of the due process clause of the United States Constitution.

III. Lowndes County having had no

control over the proceedings of the September, 1970, Grand Jury, and no control over the proceedings subsequent to the action of the September, 1970, Grand Jury, it was not a proper party to the case sub judice.

Under Georgia Law, a County is a body corporate, and as such, it has the power to sue and be sued. GEORGIA LAWS 1863-64, pp. 72,73 (GA. CODE ANN. §23-1501). But a county is not liable to suit unless it is expressly made so by statute. GA. CODE ANN. §23-1502. Being a political subdivision of the State, a county may not be sued unless it is made expressly subject to suit by statute or, in some limited cases, by necessary implication. *Mills v. Chatham County*, 27 Ga. App. 223, 109 S.E. 628 (1921); *Decatur County v. Prather & Co.*, 162 Ga. 929, 931, 137 S.E. 247 (1931). And the law is very

clear that "[i]t is incumbent upon the person filing the suit to show that his case is within the legislative authority permitting suit." *Ayers v. Franklin County* 73 Ga. App. 207, 36 S.E.2d 110 (1945); *See also: Millwood v. Dekalb County*, 106 Ga. 743, 32 S.E. 577 (1899) and *Wood v. Floyd County*, 161 Ga. 743, 131 S.E. 882 (1926). In the instant case, the Petitioner has only shown that correspondence was had with the office of the State Revenue Commissioner, notifying the Commissioner that the fine imposed by the Grand Jury on the Petitioner had not been paid, and notifying, or requesting the Commissioner that he proceed with the issuance and collection of an execution against Petitioner. But Lowndes County, acting through its Board of Commissioners, and employees, has not only the right but also the duty to see to matters which

affect the County. GEORGIA LAWS 1964, Extra Sess., pp.26, 198 (GA. CODE ANN. §23-701); GEORGIA LAWS 1877, p.109 (GA. CODE ANN. §23-702); GEORGIA LAWS 1875, p. 107, 1876, p.109 (GA. CODE ANN. §23-703); GEORGIA LAWS 1922, pp.82, 84 (GA. CODE ANN. §23-904). *Williams v. Sumter County*, 151 Ga. 402, 107 S.E. 518 (1921); *Armistead v. MacNeill*, 203 Ga. 204, 45 S.E.2d 652 (1947). The mere request of a governmental entity, or a private citizen for that matter, that another public official perform his duty, does not make the requesting entity or private citizen responsible or answerable when the requested official does perform his statuatory duty as requested. To allow such a situation could result, theoretically, in a private citizen who requested of a Tax Commissioner a sale and levy to collect taxes, responsible to the person whose property was sold for the manner in which the Tax

Commissioner did, or did not, collect the taxes and conduct the sale. The responsibility of performance, or non-performance of a statuatory duty rests solely upon the official charged with the duty. The State Revenue Commissioner properly performed his statuatory duty when he was requested or notified by the County or one of its employees to do so. *See*, GEORGIA LAWS 1884-85, p.66 (GA. CODE ANN. §92-5106) and GEORGIA LAWS 1915, p.55 (GA. CODE ANN. §92-5504). It would, at best, be unreasonable to assume that the State Revenue Commissioner would have knowledge of the grand jury's action without notification or request from someone, and the entity in the best position to be aware of the failure to pay the fine, other than the Petitioner himself, would be an officer or employee of the County. It could certainly be reasonably argued that

the Petitioner would not request the Commissioner to do his duty.

Other than, possibly, mandamus, Lowndes County had no authority over whether or not the State Revenue Commissioner performed his duty, or in what manner he performed it. The Commissioner did issue an execution against the Petitioner, and it is submitted, properly so. But the mere request or notification to the Commissioner did not, and does not, give the County any authority or control over the actions of the State Revenue Commissioner.

Nor did, or does, Lowndes County have any authority over the proceedings of the grand jury. A grand jury is generally regarded as a part of the court and supervision of the court, as an arm of the law and a part of the machinery of government; and the grand jury as a body, and its members individually, are not subject to

liability for their actions in the performance of grand jury duties. 38 C.J.S., *Grand Juries*, §45; CODE OF GEORGIA 1933 §105-807; *Thornton v. Marshall*, 92 Ga. 548, 17 S.E. 926 (1892); *Cook v. Sikes*, 210 Ga. 772, 82 S.E.2d (1954).

Having no authority or control over either the actions of the grand jury or the State Revenue Commissioner, Lowndes County should not have been continued as a party defendant in this case. Even if Lowndes County had authority or control over the actions or proceedings of the grand jury or the State Revenue Commissioner, there is no provision of law, either by statute, case, or necessary implication, which would authorize the bringing of suit against Lowndes County; the Petitioner has not shown, or attempted to show, that he has any such authority for suit; and all proceedings against Lowndes County should have been dismissed.

IV. The law under which the September, 1970, Grand Jury acted being available to all grand juries in Georgia, and the law being applicable to all Tax Commissioners, the mere enforcement of the statute does not violate the Equal Protection of Law clause of the Fourteenth Amendment to the Constitution of the United States.

A traditional test for the possible denial of equal protection of laws is whether a classification of persons or rights rests on grounds wholly irrelevant to achievement of valid state objectives. *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532 (1970) Equal protection is secured by laws which operate on all persons within the category alike, without discrimination. *Garmon v. State*, 219 Ga. 575, 134 S.E. 2d 796 (1964); *Dansby v. Dansby*, 222 Ga. 118, 149 S.E.2d 252 (1966). The right to equal protection

of laws is not a right to any specific treatment, but is simply the right of the individual to receive the same treatment as that received by others within the same category. *Heymann v. State of Louisiana*, 269 F.Supp. 36 (1967). To show that there has been a denial of equal protection of laws, a person must show an intentional or purposeful discrimination. *Whitney Stores, Inc. v. Summerford*, 280 F.Supp. 406 (1968), aff. 393 U.S. 9, 89 S.Ct. 44. Mere laxity, delay or inefficiency in the enforcement of an otherwise valid statute does not destroy the law, and selective enforcement does not violate equal protection of laws if it has a reasonable relationship to the purposes for which the legislation was established. *S. S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971). It is only in those instances where laws are applied differ-

ently to different persons under the same or similar circumstances that the equal protection of the law is denied. *Hunter v. City of Atlanta*, 212 Ga. 179, 91 S.E. 2d 338 (1956). The Petitioner has not shown, but has only alleged, that the provisions of the statutes employed by the Grand Jury of Lowndes County, has not been employed elsewhere; he has not shown that the Lowndes County Grand Jury has had occasion to use the law on other occasions, on other individuals, and has failed to do so; he has not shown any purposeful or intentional acts on the part of the Lowndes County Grand Jury to indicate that they have, or would, treat other persons any differently from their actions toward him; and, it is respectfully submitted, he has not, therefore, shown any denial of Equal Protection of the Law under the provisions of the U. S. Constitution.

CONCLUSION

There is, properly, no substantial federal question involved in the case before the court. The matter is simply one involving state law procedures which, in any event, conform to constitutional guidelines. Neither the trial court nor the Supreme Court of Georgia passed upon any alleged constitutional questions, both because the questions were not properly raised and, it is submitted, because there has been no violation of constitutional rights.

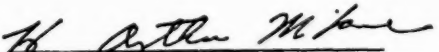
Even if constitutional questions had been properly raised, there has been no denial of the Petitioner's rights. Due process has not been denied for the reason that the Petitioner has ample opportunity, under existing state law, for timely notice and hearing before his lia-

bility, if any, is finally fixed. Equal protection of the law has not been denied for the reasons that the statute involved is a reasonable categorization and there is no indication that the Petitioner has been the subject of any discriminatory action on the part of the grand jury or that he has been treated in any manner differently from that which would be the case with any other Tax Commissioner in similar circumstances.

Lowndes County was not a proper party to these proceedings since it had no authority or control over the proceedings of either the grand jury or the State Revenue Commissioner.

Accordingly, it is submitted that the judgment of the Supreme Court of Georgia was correct in every respect and that the Writ of Certiorari should be denied.

Respectfully submitted,



H. Arthur McLane

CERTIFICATE OF SERVICE

I certify that I have served the above and foregoing Response to Petition for Writ of Certiorari to the Supreme Court of Georgia by depositing the same in the United States Mail, in a properly addressed envelope with sufficient postage thereon for delivery, to:

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This 12 day of December, 1972.

H. Arthur McLane

FILE COPY

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

NO. 72-448

BILLY WEST DASHER,

Petitioner,

v.

JOHN A. BLACKMON, Commissioner, State Department of Revenue, and Lowndes County, Georgia, and Frank S. Steele, Foreman of Lowndes County Grand Jury, September Term, 1970,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Georgia

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the Lowndes County Superior Court (App. of Petition) is unreported. The opinion of the Georgia Supreme Court (App. of Petition) is reported at 229 Ga. 289 (1972).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. Challenges to jurisdiction are set forth in Part I of the Argument of this brief.

QUESTION PRESENTED

Whether the action of a state grand jury, statutorily acting as an overseer of county government, in recommending a penalty against a county official for failure to perform his duties adequately, violates the due process of law requirement of the Fifth and Fourteenth Amendments to the Federal Constitution, where the official has notice and an opportunity to be heard before he is deprived of his property or unrestricted use of his property.

STATEMENT OF THE CASE

For several years successive grand juries of Lowndes County, Georgia, had been concerned with the large amount of delinquent and uncollected taxes owing to the county. Presentments were made regarding improved collection procedures, all of which were ignored by petitioner, the tax collector of the county. Finally, the September, 1970 grand jury invoked Ga. Laws 1884-85, p. 66 (Ga. Code § 92-5106) and imposed, *ex parte*, a forfeiture of commissions on petitioner for failure to perform his statutory duties in an adequate manner. Petitioner refused to pay and execution was issued against him by the State Revenue Commissioner pursuant to Ga. Code §§ 92-5501 and 92-5504.

Petitioner filed an equitable complaint and a motion to expunge seeking to enjoin collection of the penalty and to remove the grand jury presentment imposing the penalty from the court records. Petitioner also filed an affidavit of illegality to the execution issued against him. As permitted by Ga. Code § 92-5505, the latter pleading was filed before levy on petitioner's property. The action instituted by the affidavit of illegality is presently pending in Lowndes County Superior Court as Civil Action Number 2901.

In an order dated February 4, 1972 (App. of Petition), the trial court held the grand jury presentment to be void for two reasons. First, the court held petitioner to be a state official rather than a county official and thus a beneficiary of Ga. Code §§ 40-1617 and 89-9908. These statutes give state officials charged with criminal misfeasance or malfeasance in office the right to be served with a copy of the proposed indictment and to appear before the grand jury, with counsel, to present evidence before indictment. Second, the court held the language used by the grand jury to be unnecessary to the purpose of the presentment, outside of that body's authority, and thus required to be expunged from the court records. The trial court did not consider or decide any federal question, constitutional or otherwise.

The Georgia Supreme Court reversed the trial court, again neither considering nor deciding any federal question. (App. of Petition). The court made its holding on three bases. First, on a somewhat collateral issue, the court held the county not to be a proper party on jurisdictional grounds. Second, the court held that petitioner was a county official rather than a state official and thus not entitled to the benefits of Ga. Code §§ 40-1617 and 89-9908. Third, the court held the language of the presentment to be proper.

Petitioner vaguely and broadly set forth several federal constitutional complaints in his pleadings and also, almost as an aside, in his brief to the appellate court. However, neither the trial court nor the Georgia Supreme Court considered or ruled on these questions. This is the background with which petitioner asks this this Court to grant a writ of certiorari.

ARGUMENT

Grand juries in Georgia are empowered to perform certain supervisory functions over the operation of local government in the counties in which they serve.[1] The case *sub judice* involves the exercise by the grand jury of one county of its supervision over one county official. While the sanction imposed against petitioner is available to the grand juries of all 159 counties of Georgia and has been available at least since 1884, its imposition, as stated by petitioner in his brief, was unique. Petitioner thus admits that his questions are nonrecurring and unimportant to this Court.

Questions (b), (c) and (d) of the petition may be disposed of in summary fashion. Petitioner makes no argument concerning them in his brief, thus, if not abandoning them, at least revealing his own view as to their importance in this Court's decision whether or not to grant a writ of certiorari. Question (b) concerns solely trial court jurisdiction in Georgia, patently an area outside of federal review. Question (c) reveals the uniqueness of petitioner's case, without raising a federal question based on invidious discrimination. Question (d) is raised for the first time in any manner in petitioner's brief.

---

[1] Ga. Code Ch. 59-3 enumerates several such functions. For example, the grand jury is authorized to:

a. inspect the books and records of certain county officials and make presentments on their findings, Ga. Code § 59-309;

b. inspect the county jails and make recommendations thereon, Ga. Code §59-314;

c. inspect public buildings and property, Ga. Code § 59-315.

I

NO SUBSTANTIAL FEDERAL QUESTION WAS PROPERLY RAISED IN THE STATE COURT PROCEEDINGS.

As admitted by petitioner and shown in the opinions contained in the Appendix to the Petition, neither the trial court nor the Georgia Supreme Court considered or ruled on the questions raised by petitioner before this Court. Failure to properly raise these issues before the State Courts denies jurisdiction to this Court under 28 U.S.C. § 1257.

Even assuming, *arguendo*, that petitioner properly raised the federal questions in the trial court, the trial court, in fact, ruled for petitioner based on nonfederal grounds. It would appear to be uncontroverted that had those grounds been upheld as a matter of state law, the decision would have been based on nonfederal grounds adequate to support the judgment.

In any event, the questions were not properly raised in the Georgia Supreme Court. This requires denial of the writ. See, *Beck v. Washington*, 369 U.S. 541 (1962). The Georgia Supreme Court does not have jurisdiction to pass on constitutional questions unless they are both properly raised in and distinctly decided by the lower court. See, e.g., *In re Boult*, 227 Ga. 564 (1971). Rule 23(1)(f) of this Court places the burden on the petitioner to show that failure of the state court to rule is not based upon improper presentation of the question to it. Petitioner has not carried this burden.

It is uncontroverted that the questions petitioner poses to this Court have not been decided by the Georgia Supreme Court. This Court should decline to issue a

writ of certiorari on questions not properly presented to and passed upon by the Georgia Supreme Court.

II

THE PROCEEDING AGAINST PETITIONER DID NOT DENY DUE PROCESS OF LAW TO HIM.

Petitioner complains that the imposition of the penalty against him by the grand jury violates his right to due process of law in that his property is being taken without prior notice or an opportunity to be heard. The decisions of this Court which petitioner cites in support of his theory are inapposite to the proceedings involved in the case at bar.

The statute under which the grand jury acted provides, *inter alia:*

> ". . . the tax collector so violating shall forfeit all or such part of his commission as the grand jury of the county shall *recommend*. . . ." (Emphasis supplied.) Ga. Code § 92-5106

At this point in the proceeding no deprivation of property or rights in property occurred. The penalty recommended by the grand jury was not self-executing.

No deprivation of property or rights in property could occur until the penalty was collected by the State Revenue Commissioner through execution and levy. The Commissioner issued execution against petitioner. Petitioner filed an affidavit of illegality to the execution,[2]

[2] Ordinarily, an affidavit of illegality challenging the underlying claim behind a levy may be filed only *after* levy. See, Ga. Code § 39-1001. In petitioner's instance the affidavit of illegality was permitted to be, and was, filed *before* levy. See, Ga. Code § 92-5505.

thus joining issue as to the underlying merits of the action of the grand jury. Petitioner thus has had notice and his opportunity to be heard before taking of his property awaits him in Lowndes Superior Court in Civil Action Number 2901.

The decisions of this Court require no more elements of due process than have been afforded to petitioner in the proceedings at issue. As was recently stated by a member of this Court:

> ". . . due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use." (Emphasis in original) *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 343 (1969) (Harlan J., concurring opinion).

The required notice and hearing are, as has been shown, provided to the petitioner.

CONCLUSION

For the foregoing reasons it is respectively submitted that this petition for a writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of December, 1972, three copies of the Brief for Respondents in Opposition were mailed, postage prepaid, to James T. Bennett, Jr., Bennett, Saliba & Yancey, P. O. Box 1685, Valdosta, Georgia 31601, Counsel for Petitioner. I further certify that all parties required to be served have been served.

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